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No.

In The

Supreme Court of the United States

October Term, 1996

VYTAUTAS VEBELIUNAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the test of *United States* v. *Lane*, 474 U.S. 438 (1986), for determining whether there has been undue prejudice from the misjoinder *of defendants* in a criminal case, should be applied to determining whether there has been undue prejudice from the misjoinder *of charges* against a lone defendant, and if so, whether the petitioner meets that test as opposed to the more demanding test used by the Second Circuit?

2. Whether in a case in which the jury rendered a general verdict and was charged on two alternative theories of guilt, one of which was legally invalid, the conviction can stand when the Second Circuit looked at the charge as a whole and speculated that the jury followed only the valid alternative?

3. Whether the impartiality of a trial judge can reasonably be questioned when the judge's husband is an attorney who, after petitioner's indictment and while the case is pending, represents investors considering the purchase from a federal agency of the valuable real property that is the collateral for the credit union loans in which the defendant is accused of unlawfully participating?

4. Whether a conviction can be based solely on admissible hearsay-loan documents admitted pursuant to the business records exception to the rule against hearsay-when neither the borrowers nor any other individual with personal knowledge of the transactions testifies and can be cross examined?

THE PARTIES TO THE PROCEEDING

The caption of the case contains all the parties to the proceeding.

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In The

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS OF THE COURTS BELOW

The amended opinion of the United States Court of Appeals for the Second Circuit is reported at 76 F.3d 1283 (2nd Cir. 1996). The opinion of the United States District Court for the Eastern District with respect to recusal, which opinion was adopted by the Second Circuit, is not reported and is set forth in the Appendix at A-26.

THE BASIS FOR JURISDICTION IN THIS COURT

Judgment of conviction was entered in the United States District Court for the Eastern District of New York on April 4, 1994. The original opinion of the United States Court of Appeals for the Second Circuit affirming the judgment was issued on February 21, 1996. In response to the defendant's

timely petition for rehearing the Circuit Court issued an amended opinion on April 18, 1996. By order dated April 18, 1996 the Second Circuit authorized a further petition for rehearing or rehearing in banc. By order entered June 20, 1996 the Circuit Court denied the timely petition for rehearing and suggestion for rehearing in banc. This Court has jurisdiction to review the judgment of the Circuit Court by writ of certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the clause of Amendment V to the United States Constitution which states, "nor [shall any person] be deprived of life, liberty, or property, without due process of law."

This case also involves the clause of Amendment VI to the United States Constitution which states, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

This case also involves 28 U.S.C. §455 which is set forth in the appendix.

STATEMENT OF THE CASE

Petitioner Vytautas Vebeliunas was charged in the United States District Court for the Eastern District of New York in an indictment alleging a single violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)(18 U.S.C. §1961 *et seq.*), and multiple violations of bank fraud (18 U.S.C. §1344), misapplication of funds (18 U.S.C. §657), conflict of interest (18 U.S.C. §1006), witness tampering (18 U.S.C. §1512(b)), and making a false application (18 U.S.C.

§1014). In substance, the indictment alleged that the petitioner, the president of the Kasa Lithuanian Federal Credit Union ("Kasa"), had arranged for the credit union to lend money to borrowers who had no real interest in the proceeds of the loans which were actually benefiting the petitioner.

The case was tried to a jury and the verdict convicted the petitioner on all counts except witness tampering and one bank fraud charge on which there were acquittals. The jury also found the petitioner not guilty of three of the 14 predicate RICO racketeering acts. As a result of the acquittals on these racketeering acts the trial judge granted the petitioner's motion to vacate the RICO conviction and the accompanying RICO forfeiture imposed by the jury on the grounds the conviction and forfeiture as returned by the jury were barred by the statute of limitations and were *ex post facto*. The Government did not appeal this ruling. Sentencing focused on the value of the Florida real estate which secured the credit union loans and the extent to which the value of the real estate would reduce the financial "loss" caused by the petitioner under Federal Sentencing Guidelines calculations. The District Judge imposed a sentence of 36 months.

After the petitioner filed his notice of appeal, the parties agreed to return the matter to the District Court to address the petitioner's newly discovered claim that the trial judge should have recused herself because her husband, an attorney, had, after the indictment was issued, represented a group of investors considering the purchase from a federal agency of the Florida real property which had been the collateral for the loans charged in the indictment. The trial judge (Amon, D.J.) declared she was not aware of her husband's involvement, and the matter was transferred to another District Judge (Glasser, D.J.) to resolve the issue. Conflicting affidavits were submitted from one of the investors and the trial judge's

husband. The investor asserted that the proposal to purchase the real property had originated with the petitioner; that the petitioner's written proposal bearing his name had been forwarded to the investors' attorney-the judge's husband; that the husband was aware the petitioner was under indictment; that the petitioner was the subject of a heated discussion in the attorney's office about his participation in the transaction; that the attorney would be paid if the purchase of the Florida property was consummated; and that the attorney husband was aware that one of the potential investors, a union official, was the subject of an FBI investigation because of a $50,000 payment made towards the investment. The husband's affidavit acknowledged he had represented the potential investors and on their behalf had called the federal agency holding the Florida real property. While he had seen the petitioner's written proposal to purchase the Florida property, he averred that the petitioner's "signature on that letter made no impression on me," that prior to petitioner's motion he had not been aware that a case involving the Florida property was pending before his wife, and that prior to the motion he had not discussed either the defendant or the Florida property with his wife.

Finding the husband's affidavit "uncontroverted," the District Judge concluded that because neither the judge nor her husband was aware of the other's activities regarding the Florida property, there was no appearance of impropriety which would call the trial judge's impartiality into question. (A-26).

The appeal was then reinstated and the petitioner *inter alia* raised five central claims. First, he maintained that the convictions for conflict of interest could not stand because the trial court had instructed the jury with alternative theories of guilt, and one of those alternatives was unconstitutional

because it did not constitute a crime; second, he maintained that other counts were barred by the statute of limitations; third he argued that convictions on still other counts violated his right of confrontation because they were based solely on business records about which no one could be cross examined in court; fourth he maintained he had been severely and unfairly prejudiced by the joinder of the RICO claims with other charges; and lastly he argued the recusal ruling was incorrect.

The Second Circuit affirmed the conviction. While clearly troubled by the impermissible alternative charge, the court pronounced itself satisfied that the jury did not follow it; the court found there was no "retroactive misjoinder" of the RICO charge because the petitioner had failed to demonstrate "compelling prejudice" from the joinder of charges; it upheld the recusal ruling for the reasons stated in the District Judge's opinion; and it ruled the petitioner had waived his statute of limitations claim. In response, however, to petitioner's motion to rehear, the court issued an amended opinion agreeing that the statute of limitations claim had not been waived. The amended opinion then addressed and rejected the claim on the merits. The court authorized a further motion for rehearing and rehearing in banc. Petitioner made the motion, and it was denied.

REASONS FOR ALLOWANCE OF THE WRIT

I. Misjoinder and Prejudicial Spillover

This appeal raises the question of whether the rule enunciated by this Court for determining when a misjoinder *of defendants* requires reversal of a conviction should apply when evaluating a misjoinder *of charges* against a lone defendant.

In *United States* v. *Lane*, 474 U.S. 438 (1986), the Court ruled that a misjoinder of defendants "requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 449. Despite this standard of "actual prejudice," *see Brecht* v. *Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1722 (1993), the Second Circuit employed its own more demanding standard of "compelling prejudice" to reject petitioner's claim of misjoinder of charges. Other Circuits either use the "actual prejudice" standard of *Lane*, or a standard that seems to approach the "compelling prejudice" standard of the Second Circuit[1]. Whether the *Lane* standard is appropriate when there is a misjoinder of charges is squarely presented[2].

The Second Circuit agreed that petitioner raised a colorable claim of "retroactive misjoinder"-the initial joinder of charges can in hindsight be seen as unfair because one of the charges has been dismissed or ended in an acquittal but only after it has effected its "prejudicial spillover" on the remaining charges. The RICO charge here was dismissed only after the jury's verdict and the case was tried from beginning to end as a RICO case: the opening statements by the attorneys for each

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[1] *U.S.* v. *Melson*, 7 F.3d 750, 752 (8th Cir. 1993) ("clear prejudice and abuse of discretion"); *U.S.* v. *Tracy*, 989 F.2d 1279, 1283 (1st Cir. 1993), *cert. denied*, 113 S.Ct. 2393 (1993) ("a strong showing of prejudice"); *U.S.* v. *Fortenberry*, 914 F.2d 671, 675 (5th Cir. 1990), *reh. denied*, 919 F.2d 923, *cert. denied*, 499 U.S. 1991) ("clear prejudice"); *U.S.* v. *Gorecki*, 813 F.2d 40, 42 (3rd Cir. 1987) ("actual prejudice").

[2] The joinder of defendants addressed in *Lane* is governed by Fed. R. Crim. Pro. 8(b). Rule 8(a) governs the joinder of charges. *See also*, Fed. R. Crim. Pro. 14.

side emphasized the RICO charge and defense counsel told the jury the central issue would be whether the petitioner is a "racketeer"; six Government witnesses testified for four days to RICO racketeering acts and transactions which had no matching substantive counts in the indictment; in summation, both attorneys focused on the RICO charge and the racketeering acts which had no substantive equivalent, as the prosecutor concluded his rebuttal summation with a resounding call for conviction on the RICO charge; and the bulk of the indictment which the jury took into its deliberations related to the RICO count, as did the jury instructions which explicitly linked certain RICO racketeering acts with substantive counts in the indictment. In sum, without the RICO charge the entire complexion of the case would have been different, the strategy and tactics of the attorneys as reflected in their opening and closing remarks to the jury would have been different, and the charge to the jury would have had a markedly different emphasis.

Misjoinder of charges raises considerations and concerns discrete from the misjoinder of defendants, differences that may warrant a different standard from *Lane* for judging prejudice. While jurors can realistically be expected to ignore the alleged misconduct of one defendant when considering the guilt or innocence of another defendant, jurors cannot always be expected to guard as well against the prejudicial spillover from one set of charges to another set of charges when considering the fate of a single defendant-a recognition of human nature which informs such practices as limiting the prosecution's ability to prove prior bad acts of the defendant.

To require, as does the Second Circuit, that the prejudice from misjoinder of charges be "compelling"-that it be irresistible-means that the prejudice, as here, can be actual and substantial but, nevertheless, acceptable. Because claims of

misjoinder are recurring in the federal courts, and because the Court has left open the question of whether the *Lane* rule applies to the discrete claim of misjoinder of charges, the writ of certiorari should be granted.

II. The Alternative Jury Charge

A fundamental tenet of due process reinforced by an unbroken line of decisions from the Court mandates that no person be convicted for conduct which is not criminal. Because the Second Circuit paid only lip service to this principle, and because that court's opinion offers absolutely no assurance that the petitioner does not stand convicted and imprisoned for conduct which is not criminal, the petition should be granted.

Beginning with *Stromberg* v. *California,* 283 U.S. 359 (1931), the Court has emphasized that if a jury is instructed with alternative theories of guilt, one of which is legally invalid, and the jury renders a general verdict, the conviction must be set aside because it is impossible to determine whether the conviction was predicated on the impermissible ground and the defendant convicted for conduct that is not criminal. *Griffin* v. *United States,* 502 U.S. 46, 55 (1991); *Chiarella* v. *United States,* 445 U.S. 222, 237 n.21 (1980); *Leary* v. *United States,* 395 U.S. 6, 31-32 (1969).

In *Boyde* v. *California,* 494 U.S. 370 (1990), the Court distinguished the *Stromberg* line of cases and ruled when there is a single ambiguous jury instruction which is subject to an erroneous interpretation-as opposed to a charge in the alternative-it is proper for an appellate court to inquire whether in the context of the case and the charge taken as a whole there is a "reasonable likelihood" the jury applied the challenged instruction in a manner improperly detrimental to the defendant. 494 U.S. at 380. In sum, a lay jury cannot be

expected to resolve legal conflicts in the jury instructions, but under *Boyde* the same is not true with respect to other ambiguities in a charge. While other Circuit Courts have made the distinction between *Stromberg* and *Boyde, see, U.S.* v. *Miller,* 84 F.3d 1244, 1256-1257 (10th Cir. 1996); *U.S.* v. *Palazzolo,* 71 F.3d 1233 (6th Cir. 1995); *U.S.* v. *Tomblin,* 46 F.3d 1369, 1385-1365 (5th Cir. 1995); *U.S.* v. *Self,* 2 F.3d 1071, 1092-1094 (10th Cir. 1993), as this case demonstrates, the Second Circuit has not.

Fifteen counts in the indictment charged the petitioner with a conflict of interest (18 U.S.C. §1006), the gravamen of which is a banker's self-dealing, insider participation, or other fraudulent benefit from a loan made by his financial institution. *U.S.* v. *Faulkner,* 17 F.3d 745, 772 (5th Cir. 1994), *reh. denied,* 21 F.3d 1110 (5th Cir. 1994); *U.S.* v. *Bolstad,* 998 F.2d 597, 598 (8th Cir. 1993); *U.S.* v. *Brechtel,* 997 F.2d 1108, 1116 (5th Cir. 1993); *U.S.* v. *Payne,* 750 F.2d 844, 853-855, 858 (11th Cir. 1985); *U.S.* v. *Weaver,* 360 F.2d 903, 904 (7th Cir. 1966), *cert. denied,* 385 U.S. 825 (1966); *U.S.* v. *Spector,* 326 F.2d 345 (7th Cir. 1963). The trial court here, however, charged:

> "And the fourth element is, that the government must show that the defendant received directly or indirectly, *or caused another person or entity to receive,* some benefit in loan transactions with KASA." (emphasis added).

The plain language of the charge therefore offered the jury alternative bases for conviction: the illicit benefit could be received by the defendant himself, or he could have caused "another person or entity to receive" the benefit. The second alternative, however, does not constitute self-dealing and is not a crime under §1006.

The Second Circuit agreed that while petitioner is "correct" that the plain language of the charge offered the jury an impermissible alternative legal theory for conviction, there was no "substantial likelihood" petitioner was convicted for conduct beyond the reach of §1006 because the trial court in explaining the crime to the jury ten short paragraphs before had omitted the offending alternative language. (A-15-17). But in seeking to examine the charge as a whole to determine which legal alternative the jury chose, the Second Circuit imported the ambiguous-charge rule of *Boyde* into the alternative-charge context, substituted its own "substantial likelihood" standard for *Boyde*'s "reasonable likelihood" rule, and then engaged precisely in the type of guesswork forbidden by the *Stromberg* line of cases and by *Boyde* itself.

Significantly, in this case it was also entirely plausible that the jury did select the impermissible alternative legal theory because the evidence showed that other persons and entities such as banks and building contractors unaffiliated with the petitioner did benefit from the loans issued by the credit union.

The verdict was a general one and there is nothing in the record from which to conclude that the jury detected the erroneous legal theory in the charge and ignored it. Because the Second Circuit has failed to draw the distinction between *Stromberg* and *Boyde* which other Circuits have drawn, and because nothing in that court's opinion can assure us that the petitioner has not been convicted and imprisoned for conduct which is not a crime, the petition for a writ of certiorari should be granted.

III. Denial of the Motion to Recuse

Eight years ago the Court addressed the question of when a federal judge should recuse himself because his decision could have an economic impact on an organization with which he

has an affiliation. *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The writ of certiorari should be granted because this case raises the question of when ties of kinship between a judge and an attorney sully the appearance of justice and require the judge to recuse herself from a case. Kinship and the appearance of justice is a matter of increasing pertinence in the federal judiciary. *See e.g., Fero* v. *Kerby,* 39 F.3d 1462 (10th Cir. 1994), *cert. denied,* 115 S.Ct. 2278 (1995) (judge and brother-in-law attorney); *In re Bernard,* 31 F.3d 842 (9th Cir. 1994) (Kozinski, C.J. in chambers)(judge and attorney wife); *Matter of Billedeaux,* 972 F.2d 104 (5th Cir. 1992)(judge and attorney husband); *In re Faulkner,* 856 F.2d 716 (5th Cir. 1985)(judge and cousin witness); *Parker* v. *Connors Steel Co.,* 855 F.2d 1510 (11th Cir. 1988), *reh. denied,* 864 F.2d 795, *cert. denied,* 490 U.S. 1066 (1989) (judge's law clerk and clerk's attorney father); *Statement of Recusal Policy,* United States Supreme Court, November 1, 1993.

After the petitioner's indictment Judge Amon's attorney husband represented a group of investors considering the purchase of the valuable Florida real property that formed the collateral for the loans in which the petitioner was accused of improperly participating. The idea for the investment originated with the petitioner: he suggested it to one of the investors who in turn brought petitioner's written proposal to the other investors and the District Judge's husband. Petitioner did not learn of the husband's role until the case was pending in the United States Court of Appeals.

Judge Glasser, to whom the motion was referred, concluded that there was no appearance of impropriety because the trial judge denied any knowledge of her husband's role, and because the husband's affidavit-that he did not stand to gain financially and did not know of the defendant or of the fact

that the case was pending before his wife-was "uncontroverted." These conclusions, however, ignored this Court's rulings, ignored the affidavit submitted by one of the investors, and ignored the everyday observation that to the reasonable man ties of kinship in a legal proceeding can be just as insidious as potential financial gain.

The trial judge's ignorance of her husband's role is not dispositive: "The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. at 859. The facts and circumstances must "quell the concerns of the skeptic." *Id.* at 865 n.12.

For two reasons-both of which suggest review by the Court is warranted-these concerns are not abated here. First, we are dealing with the relationship between husband and wife, a relationship "intimate to the degree of being sacred." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). A reasonable person expects that certain matters pass between husband and wife that would not pass between others involved in a more distant relationship, and the law therefore explicitly commands a federal judge to keep informed of her husband's financial interests. 28 U.S.C. §455(c). These normal expectations are forcefully pertinent here because the husband is an attorney and his law practice focused on the type of civil and white collar criminal cases that are the staple of a District Judge's calendar. In addition, the husband's activities here related to the real property which was a feature of the six-week trial, the information he acquired bore directly on matters at sentencing-the value of the Florida collateral, the husband personally handled the matter for his firm, his activities and knowledge were contemporaneous with the criminal case, and

his clients argued over the petitioner's participation in the transaction. The close kinship between a judge and an attorney representing investors seeking the valuable collateral at the center of a pending criminal case would raise the eyebrows of even the least skeptical among us, yet the lower courts resolved the matter as if the judge and attorney were strangers to each other.

Even more eyebrow-raising is the *manner* in which Judge Glasser resolved the matter: he simply accepted as "uncontroverted" the husband's affidavit which claimed ignorance and made the improbable assertion he would not anticipate a fee on a potential multimillion dollar transaction. But the absence-of-contradiction finding was made in the face of an affidavit[3] from one of the investors which plainly stated that the husband would earn a fee if the transaction was consummated, that the husband was aware the petitioner was under indictment, that the petitioner had been the subject of a "heated discussion" in the husband's presence, in the husband's office, over whether the investors should continue to participate with the petitioner in the transaction, and that the

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[3] The investor submitted an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. §1746 which under the statute is accorded "like force and effect" as an affidavit, *Goldman, Antonetti, Ferrainoli, Axtmayer & Hertell* v. *Medfit International, Inc.*, 982 F.2d 686, 689-690 (1st Cir. 1993); *McLaughlin* v. *Cohen*, 686 F. Supp. 454, 457 (S.D.N.Y. 1988); *Bleavins* v. *United States*, 807 F.Supp. 487, 489, *aff'd*, 998 F.2d 1016 (7th Cir. 1993); *Carter* v. *Clark*, 616 F.2d 228 (5th Cir. 1980), and any false statements in it would provide the basis for a perjury prosecution under 18 U.S.C. §1621. *Dickinson* v. *Wainwright*, 626 F.2d 1184, 1185 (5th Cir. 1980); *see also*, 18 U.S.C. §1623. Judge Glasser's denigration of the statement because it was not sworn before a notary was therefore erroneous as a matter of law.

husband was aware that one of the investors-a union official-was the subject of an FBI investigation into a $50,000 payment he had made towards the investment. In sum, the cavalier and unexplained manner in which Judge Glasser dismissed the investor's affidavit serves to heighten rather than dispel the concerns of any reasonable man.

The kinship between judge and attorney, and the dismissive approach of the lower courts, raise questions and concerns about the appearance of justice which the Court has not previously addressed. The writ of certiorari should therefore be granted.

IV. Hearsay and the Right of Confrontation

In *Moore* v. *United States,* 429 U.S. 20 (1976), the Court held that a criminal conviction cannot rest on inadmissible hearsay evidence. The petition for a writ of certiorari should be granted because this case raises the question of whether a criminal conviction can be based solely on admissible hearsay evidence-business records placed in evidence through the custodian of the records-which was not subject to any meaningful cross examination.

With respect to eleven counts of the indictment charging bank fraud and the misapplication of funds, the Government placed various loan documents in evidence pursuant to the business record exception to the rule against hearsay, Fed. Rule Evi. 803(6). The custodian of the records who testified had no personal knowledge of the transactions evidenced in the loan documents, and none of the borrowers on these loans was called to testify. The defendant did not testify. In the absence of witnesses, the prosecutor argued that because loans with other borrowers who did testify were unlawful, the loans covered by these 11 counts must also be unlawful.

Assuming *arguendo* that the business record exception is one of the "firmly rooted" hearsay exceptions that would satisfy the Confrontation Clause, *Idaho* v. *Wright,* 497 U.S. 805, 821 (1990); *U.S.* v. *Jacoby,* 955 F.2d 1527, 1538 (11th Cir. 1992), *cert. denied,* 113 S.Ct. 1282 (1993), the *admissibility* of business records does not resolve the question of whether there can be a *conviction* based solely on this admissible hearsay evidence. The business records were not merely crucial to the Government's case; they were the Government's only evidence on these eleven counts.

In two respects the conviction on these counts is particularly disturbing. First, the Government had informed the trial court that in an FBI interview one of the borrowers had denied any impropriety with respect to the loan, yet at the same time the Government asked the jury to draw a guilty inference from the loan documents without hearing from the borrower himself and without knowing that the borrower had offered an account different from that being advanced by the Government; and second, the Government asked the jury to convict on another loan solely because the borrower on the loan documents was the petitioner's daughter.

Petitioner had no opportunity to cross examine anyone with any personal knowledge of the contents of the loan documents placed in evidence. Defense counsel objected to the Government's methodology and the trial judge expressed grave concern about it. Other courts have not permitted convictions to stand in similar circumstances. *Pickett* v. *Bowen,* 798 F.2d 1385 (11th Cir. 1986); *U.S.* v. *Washington,* 688 F.2d 953, 959 (5th Cir. 1982). Because this case raises the question of the propriety of securing a criminal conviction solely on the basis of admissible hearsay, the writ of certiorari should be granted.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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September 18, 1996

APPENDICES

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[AMENDED]

United States Court Of Appeals

FOR THE SECOND CIRCUIT
No. 153—August Term, 1995
(Argued: September 21, 1995
Decided: February 21, 1996)

Amended in Response to Petition for Rehearing:
April 18,1996

Docket No. 94- 1185

UNITED STATES OF AMERICA,

Appellee,

vs.

VYTAUTAS VEBELIUNAS, also known as VV,

Defendant-Appellant.

Before:

OAKES, MINER, and MAHONEY,

Circuit Judges.

Defendant-Appellant Vytautas Vebeliunas appeals from a judgment entered April 4, 1994 in the United States District Court for the Eastern District of New York, Carol Bagley Amon, *Judge*, that convicted him of numerous criminal violations in connection with his relationship with the Kasa

Lithuanian Federal Credit Union, and from an order entered December 16, 1994 in that court, I. Leo Glasser, *Judge*, that denied Vebeliunas' motion pursuant to 28 U.S.C. § 455 to vacate the judgment of conviction.

Affirmed.

NORMAN A. OLCH, New York, New York, *for Defendant-Appellant.*

GORDON MEHLER, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Zachary W. Carter, United States Attorney, Susan Corkery, Assistant United States Attorney, Brooklyn, New York, of counsel), *for Appellee.*

MAHONEY, *Circuit Judge:*

Defendant-appellant Vytautus Vebeliunas appeals from a judgment entered April 4, 1994 in the United States District Court for the Eastern District of New York, Carol Bagley Amon, *Judge*, that convicted him of eight counts of bank fraud in violation of 18 U.S.C. § 1344 (counts 2, 4-5, 29, 32-33, 38, and 41), fifteen counts of criminal conflict of interest in violation of 18 U.S.C. § 1006 (counts 18-28, 31, 36-37, and 40), sixteen counts of misapplication of credit union funds in violation of 18 U.S.C. § 657 (counts 3, 7-17, 30, 34-35, and 39), and one count of causing the filing of a false loan application in violation of 18 U.S.C. § 1014 (count 42)[1], all stemming from abuses of his relationship with the Kasa Lithuanian Federal Credit Union ("Kasa"). Vebeliunas was

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[1] This count merged into the count 41 bank fraud charge.

acquitted on one count of bank fraud (count 6) and two counts of witness tampering in violation of 18 U.S.C. § 1512(b) (counts 43-44). His conviction on a substantive RICO count for violation of 18 U.S.C. § 1962(c) (count 1) was vacated in response to a post trial motion as hereinafter described. Vebeliunas also appeals from an order entered December 16, 1994 in the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, that denied Vebeliunas' post trial motion pursuant to 28 U.S.C. § 455 to vacate the judgment of conviction.

Vebeliunas was sentenced to thirty-six months imprisonment on each count, to run concurrently, followed by three years of supervised release. Judge Amon also imposed restitution in the amount of $581,194, a $60,000 fine, and special assessments totaling $800.

Vebeliunas contends on appeal that: (1) the district court's jury instructions on the conflict of interest counts improperly amended the indictment, and also allowed him to be convicted on the basis of conduct that was not criminal; (2) counts 7-14 were barred by the applicable statute of limitations; (3) the government's failure to call as witnesses the borrowers with respect to the loans at issue on counts 2-4, 11, 14, 16-17, 22, 25, and 27-28 violated his rights under the Confrontation Clause of the Sixth Amendment; (4) the district court erred by allowing the government to request the jury to draw inculpatory inferences from its own witnesses' exculpatory statements, thereby undermining the convictions on counts 32-40; (5) the evidence presented to the jury regarding the RICO count that was later dismissed created prejudicial spillover as to all of the remaining counts, requiring the reversal of his convictions on all counts; (6) his motion to vacate the judgment based upon 28 U.S.C. § 455 should have been granted because of an appearance of partiality by Judge

Amon; (7) he was denied the effective assistance of counsel by his counsel's failure to interview fifteen potential witnesses; (8) the bank fraud convictions are multiplicitous; and (9) there was insufficient evidence to support his conviction on any count because there was no evidence that he misled Kasa.

We affirm the judgment of conviction and the denial of Vebeliunas' post trial recusal motion.

Background

In view of the guilty verdicts that the jury rendered on almost all of the counts submitted to it, the factual recital that follows credits all the jury findings and inferences in favor of the prosecution that the jury might reasonably have drawn from the evidence presented to it.

In 1980, Vebeliunas participated in the founding of Kasa, a federal credit union chartered and insured by the National Credit Union Administration (the "NCUA"). During the 1980s, Kasa acquired assets of more than $80,000,000 and a membership of approximately 6,000, and opened branches in several different states.

Vebeliunas served as Kasa's president and as one of its directors until 1987. During this time, Kasa was headquartered in the same Queens, New York office building where Vebeliunas had his personal business office. At trial, the government introduced evidence that Vebeliunas managed Kasa's daily operations and controlled its loan decisions. Vebeliunas accomplished this by staffing Kasa's credit committee with employees of his other businesses, and by allowing only people who lacked financial sophistication to serve on Kasa's board of directors.

In 1987, Kasa removed Vebeliunas from its board of directors and terminated his presidency. By 1991, many loans to companies under Vebeliunas' control were in default, and Kasa was placed in conservatorship that August. These difficulties ultimately led to the liquidation of Kasa on July 31, 1992.

A. The Fraudulent Loans.

At trial, the government produced evidence showing that Vebeliunas used his influence to procure a number of improper Kasa loans for the benefit of companies under Vebeliunas' control, including Litas Investing Company, Inc. ("Litas"), Panagra Properties, Inc. ("Panagra"), Litas Travel, World Trade Industries ("WTI"), and Seaview Construction. These companies all had their offices in the same building as did Kasa and Vebeliunas, and there was no physical separation between them and Kasa in that building. Vebeliunas used numerous "straw borrowers," who did not actually receive the proceeds of their loans and who were assured that they would not have to repay the loans, to obtain money from Kasa. Vebeliunas also falsified documents in order to raise capital to fund the ventures of the companies under his control.

1. *The Beach Club of Marco Island Loans.*

In 1984, Vebeliunas formed Panagra in order to acquire the Beach Club of Marco Island (the "Beach Club"), a condominium hotel in Florida. On February 1, Panagra contracted with Broward Management Company to purchase twenty-seven units of the Beach Club for $2,080,812. This transaction required Panagra to produce a down payment of $310,000. Vebeliunas caused Stephen Hill, an attorney and part-time Kasa employee, to file for a loan in the amount of $310,000 from Kasa. Without Hill's knowledge, Vebeliunas

later altered the application by changing the amount of the loan to $350,000. The Kasa board of directors approved the $350,000 loan to Hill based upon the false representation that Hill was in a contractual relationship with Panagra.

Vebeliunas then raised the rest of the money for Panagra to purchase the twenty-seven units by persuading twenty-seven individuals to apply for loans from Kasa. While each loan application stated that the individual was making a deposit of approximately $20,000 of his "own funds," in fact, each individual paid only $4,750, with the remainder to be supplied by Litas. These twenty-eight loans (including the Stephen Hill loan) were not separately charged in the present prosecution because they were time barred, but the loans were charged as predicate acts under the RICO count.

Next, Vebeliunas sought to acquire the remaining Beach Club units. He paid Edwin Stots $10,000 to file a Kasa loan application in the amount of $700,000 in order to raise the money necessary for this endeavor, and Stots testified that Vebeliunas had told Stots that another person named "Rimas" was doing the same thing. This testimony is corroborated by a Kasa loan application filed by Vebeliunas' wife's brother-in-law, Rimas Valaitis, in the amount of $700,000. The funds from these two loans were subsequently used by Panagra to purchase the remaining Beach Club units.

The Stots and Valaitis loans were never fully repaid. When Kasa was placed in conservatorship, the balance on these loans amounted to approximately $627,000.

2. *The Club Regency of Marco Island Loans.*

Later in the same year, Vebeliunas decided to purchase Club Regency of Marco Island ("Club Regency"), another condominium development located near the Beach Club. The

owner, Leonard Masello, was in default of his loan payments to the Naples Federal Savings and Loan Association ("Naples Federal") with respect to Club Regency, and agreed to sell the property.

Vebeliunas raised the money for this purchase by persuading eight straw borrowers each to apply for a $100,000 loan from Kasa. The borrowers knew little or nothing about the purpose of the loans, and Vebeliunas assured them that they would not be liable for their repayment. Approximately half of this money was paid to Masello and to Naples Federal, while the other half was placed in a Kasa account that was drawn down to $5.00 by early 1985. These eight loans were never fully repaid, and a balance of $667,110 was due to Kasa as of the date of conservatorship.

A few months later, the Naples Federal loan fell into default, and Vebeliunas once again resorted to straw borrowers from Kasa to satisfy Naples Federal's demand for $500,000. Kasa issued loans to Joseph and Raymond Miezelis in the amounts of $150,000 and $350,000, respectively. Once again, the interests of Litas and Vebeliunas in the loan were never disclosed. The loans to the Miezelis were also never fully repaid; approximately $490,000 remained due at the date of conservatorship.

In early 1986, the Naples Federal loan again fell into default, and Vebeliunas caused Edwin Stots to write a check for $125,000 to Naples Federal. Vebeliunas then used funds from Kasa to cover this check. The funds were acquired by means of a loan in the name of Stots' father, who was never made aware of the loan. As of the date of conservatorship, this loan had a balance of $109,137.39 that remained due.

3. *The WTI Loans.*

WTI was a New York company that engaged principally in the business of exporting industrial equipment and was owned by Vadim Kersha and two other individuals. In 1983, Kersha and his wife each borrowed $50,000 from Kasa, secured by a second mortgage on their home, to meet WTI's ongoing capital requirements.

In 1984, Vebeliunas contracted with Kersha and the other two owners to purchase WTI. In the contract, Vebeliunas promised to cancel or assume the Kershas' Kasa loans. Vebeliunas then hired Romauld Ausmanas, a recent immigrant to the United States, to work for WTI, and convinced him to sign a loan application for $100,000 from Kasa. Vebeliunas used this money to retire the Kershas' loans.

WTI filed for bankruptcy in April 1988. The unpaid balance of the Ausmanas loan amounted to $90,364.35 as of the date of conservatorship.

4. *The Mill Neck House Loan.*

Doretta Fabbri was an employee of Litas Travel. Her testimony was compelled under a grant of immunity after she invoked the Fifth Amendment privilege against self-incrimination.

Fabbri applied for a $525,000 loan from Kasa. This money was used to purchase a house in Mill Neck, New York. While Fabbri signed the loan application, the rest of the handwriting on the application was not hers. At trial, Fabbri claimed that the loan was genuine, and that she had purchased the house as an investment. Nonetheless, the government argued to the jury that her story was incredible, and that she had in fact been a straw borrower who had "front[ed]" the purchase for Litas.

Fabbri conceded that she could not remember who had completed the loan application, that she was not sure how she had learned about the availability of the Mill Neck house for purchase, and could not remember where the house was in Nassau County. Furthermore, Fabbri apparently received a $3,000 "commission" from Litas for purchasing the house. Litas' bookkeeper, Rima Gudaitis, could offer no explanation why Fabbri was entitled to a commission for purchasing a house as her own personal investment.

5. *The Bridge Loans.*

Zenonas Jurys, one of the founders of Kasa and a member of its supervisory committee, and Rimas Vaicaitis, a professor at Columbia University and former president and a director of Kasa, were both longtime associates of Vebeliunas. In July 1985, Jurys and Vaicaitis each applied for $750,000 loans from Kasa. The applications described the loans as "bridge loans," and the loans were repaid shortly after they were made. The funds were to be provided to Vebeliunas to use for business purposes. Neither Jurys nor Vaicaitis had the ability to repay the loans, and Vebeliunas assured them that they would not have to do so.

These loans were approved on July 16, 1985, three days before the applications were completed and submitted to Kasa for consideration. To correct this discrepancy, the applications were backdated to July 10 (Vaicaitis) and 11 (Jurys).

On July 19 and 20, Vebeliunas signed Litas checks in the amount of $3,000 to the order of Vaicaitis and Jurys, respectively. While these checks were recorded as consulting fees, and Vaicaitis and Jurys testified that they were in payment of obligations for genuine services, the government

argued to the jury that the payments were in consideration for their acting as straw borrowers.

6. *The Lighthouse Shores Loans.*

By 1988, Vebeliunas had been removed as Kasa's president, and Kasa had adopted a policy that forbade the lending of money to entities with which Vebeliunas was connected. Nevertheless, Vebeliunas persuaded Marissa Santangelo, a friend, to take out a loan from Kasa in order to purchase some land in Daytona Beach, Florida called Lighthouse Shores. Vebeliunas had already purchased the judgment in foreclosure on the property, and needed the money from Kasa to reimburse himself. Vebeliunas promised to grant Santangelo a partnership in the property, which was to be held in Santangelo's name.

Vebeliunas caused Santangelo to file the loan application, and to complete a form certifying that she was "not a fiduciary or nominee nor d[id she] represent any other person(s), corporation(s), trust(s), partnership(s) or other legal entity of any nature or description whatsoever." Based upon this misrepresentation, Kasa issued a loan to Santangelo in the amount of $136,000 which, after a number of defaults, was ultimately sold. The general manager of Kasa and a member of its credit committee both testified at trial that the loan would not have been approved if Vebeliunas' interest had been disclosed.

B. The Proceedings in the District Court.

The indictment in this case was issued on December 16, 1992, and the trial was held from September 27 to November 1, 1993, when the jury returned its verdict as previously described. At sentencing, the district court granted a motion by Vebeliunas to vacate the RICO count. The jury verdict had

found three of the charged RICO predicate acts not proved. As a result, the jury had not found a predicate act of bank fraud to have occurred after August 9, 1989, the date on which bank fraud became a predicate act for RICO purposes. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (the "1989 Act"), § 968, 103 Stat. 183, 506 (1989). The court concluded that the prior predicate acts of bank fraud therefore could not be used to sustain the RICO conviction, that the remaining predicate acts, considered separately, were time barred, and that the defendant had not waived this limitations defense because it had arisen only as a result of the jury verdict .

The court denied a post trial motion by Vebeliunas to dismiss the misapplication counts on the basis of the statute of limitations, declined to vacate the remaining convictions on the basis of spillover prejudice from the dismissed RICO count, ruled adversely to Vebeliunas' other applications for post trial relief, and sentenced Vebeliunas as previously described.

After sentencing, Vebeliunas filed a motion in the district court to vacate his conviction and to disqualify Judge Amon based upon an alleged conflict of interest. Vebeliunas alleged that certain contacts between Judge Amon's husband and individuals who were considering a purchase of the Beach Club in partnership with Vebeliunas created an appearance of partiality on the part of Judge Amon.

The facts underlying the alleged conflict are as follows. In May 1993, Vebeliunas made contact with James Ewell, a real estate investor, regarding a proposal that Ewell purchase the Beach Club, which was by then owned by the NCUA as liquidator. Ewell contacted James Lewis, another real estate investor, in order to try to get financing for the purchase. In

addition to looking into raising the necessary money for the Beach Club transaction, Lewis also called Thomas Amon ("Amon"), an attorney and Judge Amon's husband.

Amon received copies of some correspondence that Vebeliunas had sent to Ewell about the Beach Club, and Ewell and Lewis met with Amon in Amon's Manhattan office in July 1993. They discussed the possibility of Amon representing them in the acquisition of the Beach Club. Amon then made a phone call to Thomas Groendyke, a representative of the NCUA, to discuss the proposed transaction. The meeting lasted approximately twenty minutes. Amon was never retained by Ewell and Lewis to represent them in the Beach Club transaction, and did not receive any fee from the real estate investors.

The parties met with Judge Amon on September 8, 1994 to discuss the recusal motion. Judge Amon stated that she had been unaware of her husband's relationship to the Beach Club investors, and that the amount of restitution she had ordered did not include the value of the Beach Club, which had been adequately collateralized. The defense indicated that it wished to elicit Thomas Amon's testimony regarding his involvement with Ewell and Lewis. Judge Amon determined that the motion should be reassigned to another district judge so that she would not have to evaluate her husband's testimony. It was reassigned to Judge Glasser, who denied the motion. *See United States v. Vebeliunas*, No. CR-921338 (CBA), slip op. (E.D.N.Y. Dec. 15, 1994). Judge Glasser concluded that neither Judge Amon nor her husband had a financial interest in the outcome of the case, id. at 9, and that "these facts cannot reasonably bring into question the impartiality of Judge Amon," *id.* at 11.

This appeal followed.

Discussion

Vebeliunas' claims of error are set forth at the outset of this opinion. We address them in turn.

A. *The Jury Instructions Regarding the Conflict of Interest Counts.*

Counts 18-28, 31, 36-37, and 40 all charged Vebeliunas with violations of 18 U.S.C. § 1006.[2] In charging the jury on these counts, the district court read the statute to the jury and then broke it down into four elements that the government must prove beyond a reasonable doubt: (1) Vebeliunas was "an officer, agent or employee" of Kasa; (2) "[T]he Kasa accounts were insured by the [NCUA];" (3) Vebeliunas "acted with intent to defraud Kasa and/or an examiner of the [NCUA];" and (4) Vebeliunas "participated in, shared in or received money, property, [or] benefits through transactions, loans and acts of [Kasa]."

The district court then explained each of the four elements to the jury. In explaining the fourth element, Judge Amon said: "[T]he fourth element is, that the government must show that the defendant received directly or indirectly, *or caused another person or entity to receive*, some benefit in loan

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[2] As pertinent in this case, § 1006 stated in relevant part:

Whoever, being an officer, agent or employee of or connected in any capacity with . . . any institution . . . the accounts of which are insured by the . . . Administrator of National Credit Union Administration . . ., with intent to defraud . . . such institution . . . participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such . . . institution . . .. shall be fined not more than $10,000 or imprisoned not more than five years, or both.

transactions with Kasa [emphasis added]." In fact, the emphasized portion of the district court's explanation does not correspond to the language of either § 1006 or the indictment.

Vebeliunas argues that Judge Amon's explanation of the fourth element improperly broadened the conduct upon which he could be convicted for violations of §1006. He argues that because the instruction allows a conviction if Vebeliunas conferred a benefit upon another person, and not upon himself, the charge effected a constructive amendment of the indictment in violation of his Fifth Amendment right to be convicted only for crimes indicted by a grand jury, *see Stirone v. United States*, 361 U.S. 212, 217-18 (1960), and indeed allowed him to be convicted for conduct that did not even constitute a violation of § 1006.

A constructive amendment occurs when the government's presentation of evidence and the district court's jury instructions combine to "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir.) (collecting cases), *cert. denied*, 115 S. Ct. 258 (1994). Constructive amendments "are per se violations of the [F]ifth [A]mendment that require reversal even without a showing of prejudice to the defendant." *Id.* (collecting cases).

An alternative, and even more fundamental, basis for reversal is presented by Vebeliunas' claim that the district court's instruction allowed him to be convicted for conduct that not only was not charged in the indictment, but is not even proscribed by §1006. "We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct."

Chiarella v. United States, 445 U.S. 222, 237 n.21 (1980) (collecting cases).[3]

Vebeliunas is correct that the language "or caused another person or entity to receive," if read in isolation, would seem to enlarge the proscribed behavior beyond the language of both the indictment and § 1006. The grammatical placement of this language suggests that it is an *alternative* to a benefit to Vebeliunas, as Vebeliunas contends.

Nevertheless, we must examine the district court's instruction "in its entirety and 'not on the basis of excerpts taken out of context." *Clemente*, 22 F.3d at 483 (quoting *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)); *see also Chalmers v. Mitchell*, 73 F.3d 1262, 1267 (2d Cir. 1996). In our view, when Judge Amon's explanation of the misapplication counts is examined in full, the challenged language is properly regarded as simply emphasizing the permissibility of convicting even though the benefit to Vebeliunas was indirect.

It is significant that Judge Amon twice correctly told the jury that Vebeliunas must personally benefit either directly or indirectly for them to convict him on the conflict of interest counts. When Judge Amon first read the statute to the jury, she did not mention an alternative allowing conviction if Vebeliunas conferred a benefit upon a third party, and when she broke the statute down into its elements, she again said

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[3] A different rule applies when reversal is urged because of an asserted insufficiency of the evidence to support an alternative ground for conviction, rather than an error of law in allowing the jury to consider an alternative ground for conviction. See *Griffin* v. *United Stares*, 502 U.S.46, 59-60 (1991).

that Vebeliunas must personally benefit. Only in her subsequent parsing of these elements did Judge Amon make the challenged statement.

This distinguishes the present case from the cases that Vebeliunas cites in support of his position. In *Stirone*, for example, the district court's instruction improperly allowed conviction for the unlawful obstruction of interstate transportation of either sand or steel, the latter of which was not charged in the indictment. *See Stirone*, 361 U.S. at 214. The jury instruction in *Mollica* permitted conviction if the jury found a conspiracy to defraud the United States "in any manner or for any purpose," while the indictment was limited to income tax fraud. 849 F.2d at 728. There was no ambiguity about the meaning of the court's charge in those cases; the only issue was whether the instruction broadened the indictment.

In contrast, the instant case presents the primary question of what interpretation to give to the district court's instruction. In the context of the jury charge as a whole, we believe that the challenged language in Judge Amon's instruction simply served to underscore the fact that the money could go to entities under Vebeliunas' control rather than having to go directly to Vebeliunas personally.

The plausibility of this interpretation is further strengthened when considered in the context of the facts of the case. Vebeliunas was charged with looting Kasa principally to fund real estate ventures on behalf of a group of companies under his control. The district court undoubtedly felt it necessary to emphasize the fact that benefiting "another . . . entity" under Vebeliunas' control would count as an "indirect[ ]" benefit to Vebeliunas himself for purposes of § 1006. The evidence would not support a claim that the sham borrowers who applied for loans from Kasa on behalf of Vebeliunas and his

controlled companies were principals for whose independent benefit the loan proceeds were to be applied.

In light of the overall evidence and the language of Judge Amon's instruction taken as a whole, we conclude that there was not "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury," *Clemente*, 22 F.3d at 482, or for conduct that is not proscribed by § 1006. This conclusion is buttressed by the fact that unlike *Mollica*, for example, where the defendant vigorously objected to the disputed instruction upon which we premised reversal, *see* 849 F.2d at 728, no objection was taken in this case to the instruction that is now challenged on appeal. Thus, as Vebeliunas concedes, he may prevail on this argument only by establishing plain error.

To satisfy this standard, the error "must have been prejudicial: It must have affected the outcome of the District Court proceedings." *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993) (collecting cases). Further, when no objection was made below and plain error is accordingly at issue, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Even if we perceived significant ambiguity in the challenged instruction when read in context, it is clear that in view of the overall evidence presented to the jury, Vebeliunas has not established that the instruction prejudiced him.

In sum, both because the challenged jury instruction, read in context, neither constructively amended the indictment nor allowed Vebeliunas to be convicted for noncriminal conduct, and because in any event Vebeliunas has not established that he was prejudiced by the instruction, we perceive no basis for reversal of the § 1006 convictions.

B. Statute of Limitations Defense to Some Misapplication Counts.

Counts 7-14 charge Vebeliunas with misapplication of bank funds in violation of 18 U.S.C. § 657. The conduct charged in these counts occurred in the summer of 1984. At that time, the statute of limitations for this offense was five years, as specified by the general statute of limitations for noncapital offenses provided by 18 U.S.C. § 3282. Effective August 9, 1989, however, a new ten year statute of limitations for violations of § 657 was established by the enactment of §961(1)(1) of the 1989 Act, 103 Stat. 501 (1989). Section 961(1)(1) added limitations for violations of § 657. Section 961(1)(3) provides, however, that: "The amendments made by this subsection shall apply to an offense committed before the effective date of this section, if the statute of limitations applicable to that offense under this chapter had not run as of such date." 103 Stat. 501.

Thus, the new ten-year statute of limitations governed conduct that occurred before its effective date only if the statute of limitations otherwise applicable to that conduct had not run as of August 9, 1989. Vebeliunas contends that: (1) he assured the straw borrowers prior to August 9, 1984 that they would not have to repay the loans which they borrowed from Kasa; (2) the violation of § 657 was complete at that juncture; and (3) the five year limitations period accordingly expired before August 9, 1989. The government argues that the violation of § 657 was not complete until all of the borrowed funds were disbursed, which occurred after August 9, 1984, and in any event that Vebeliunas waived the limitations defense.

Vebeliunas unsuccessfully moved before trial to dismiss counts 7-14 on the basis of the statute of limitations. However,

no jury instruction was requested at trial concerning the issue. The issue was raised in a post trial motion by Vebeliunas for acquittal or a new trial.

The district court denied the post trial motion at the outset of the sentencing hearing both on the merits and on the basis of waiver. When the matter was again raised later in the sentencing hearing, the government argued against Vebeliunas' limitations defense on both grounds, and the court responded that "in any event" the defense failed on the merits without explicitly reiterating the waiver ground of decision. Vebeliunas contended at the oral argument of this appeal that the court decided the limitations issue solely on the merits, and that we should address only the merits of the issue on this appeal.

We disagree. As we read it, the record does not support Vebeliunas' claim that Judge Amon abandoned the waiver ground as a basis for denying his limitations defense. In our view, Judge Amon reiterated both grounds when the limitations issue was revisited, but cut off discussion of the waiver issue by noting that she viewed the claim as failing on the merits, as well.

In any event, we do not believe that Vebeliunas waived the limitations defense by failing to request a jury instruction on the issue. His limitations argument is premised upon a legal position that he had argued unavailingly to the district court in a pretrial motion. *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980), upon which the government relies to argue waiver, is distinguishable because the limitations issue in that case was one of fact to be decided by the jury. When, as in this case, the limitations argument is purely an issue of law, there would be no point in requiring a party to seek a jury instruction in the aftermath of an unsuccessful

pretrial motion. Vebeliunas raised the issue in a pretrial motion that was denied by the district court. If, as the district court ruled in response to that motion, the date of disbursement of the borrowed funds controls the limitations issue, there was no factual issue left for the jury's consideration. *See infra* note 4. We turn to the merits of Vebeliunas' limitations argument.

Vebeliunas directs that argument to counts seven through fourteen of the indictment. These counts all assert that funds were disbursed at various times in August 1984.[4] Vebeliunas contends, however, that assurances were provided to the straw borrowers prior to August 1984 that they would not be required to repay the loans, that the violation of 18 U.S.C. § 657[5] was complete at that juncture and therefore commenced the running of the statute of limitations, that Judge Amon so

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[4] Count eight states that the funds were disbursed in August 1985, rather than August 1984, but this apparently a typographical error. The eight $100,000 loans were all part of interconnected financing to acquire Club Regency, as previously described. As to counts eight, eleven, twelve, and thirteen, the indictment alleges that some funds were disbursed before, and some after, August 9, 1984. As to counts seven, nine, ten, and fourteen, the indictment alleges that all funds were disbursed after August 9, 1984. Vebeliunas does not contest the disbursement dates alleged in the indictment, and his argument is not premised upon these dates.

[5] Section 657 provides in pertinent part:

Whoever, being an officer, agent or employee of or connected in any capacity with . . . any institution . . . the accounts of which are insured . . . by the National Credit Union Administration Board. . . embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined . . . or imprisoned . . . or both

instructed the jury, and that these counts of the indictment are accordingly time-barred. We disagree.

Vebeliunas invokes *United States v. Stuart*, 718 F.2d 931, 933-34 (9th Cir. 1983), in support of this argument. He cites Stuart for the proposition that actual disbursement of funds is not required for a § 657 violation. See 718 F.2d at 933-34. In that case, the defendant, a bank employee, had prepared a $40,000 cashier's check with the intention to steal that amount from an account at the bank, but the plan was frustrated when a party to whom the check was tendered called the bank for verification, which resulted in the check being dishonored by the bank. Holding "that actual disbursement of money is not required under section 657," *id.* at 934, the Ninth Circuit affirmed the district court's denial of Stuart's motion for acquittal, *id.*

The same court has squarely held, however, that in a case where funds are actually disbursed, as here, the crime is complete when the funds leave the control of the institution from which they are misapplied. In *United States v. Musacchio*, 968 F.2d 782 (9th Cir. 1992), that court ruled as follows:

> A statute of limitations begins to run when "the crime is complete". *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 860, 25 L.Ed.2d 156 (1970) *(citing Pendergast v. United States*, 317 U.S. 412, 418, 63 S. Ct. 268, 271, 87 L.Ed. 368 (1943)). A crime is complete as soon as every element in the crime occurs. The misapplication crime charged in this case was complete on or about June 28, 1983, when the $5.3 million and a note for $4 million left the control of Columbus Savings. The indictment was returned less than

> five years later, on June 17, 1988. The statute of limitations did not bar the bringing of this action.

968 F.2d at 790; see also *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987) ("The limitations period is measured from the point at which the crime is complete." (citing Toussie, 397 U.S. at 115)), *cert. denied*, 486 U.S. 1022, 488 U.S. 982 (1988).

We agree with this analysis. Accordingly, because funds were concededly disbursed after August 9, 1984 with respect to each of the misapplications charged in counts seven through fourteen, *see supra* note 4, the district court correctly ruled that none of these counts were barred by the statute of limitations. We add that Judge Amon did not provide any contrary instruction to the jury. Her charge that "[w]illful misapplication includes situations where the official . . . assures a named borrower that he or she will not be responsible for repayment" was directed to defining an element of that crime, not to any determination regarding when the crime is complete so as to trigger the statute of limitations.

C. Prejudicial Spillover from Vacated RICO Count.

As previously noted, Judge Amon granted Vebeliunas' post trial motion to vacate the RICO count at the sentencing hearing. Vebeliunas then argued that spillover prejudice from that count required that his other convictions be vacated. The district court rejected this contention, pointing out that most of the RICO predicate acts constituted separate substantive counts as well, and that the evidence regarding the remaining acts would have been admitted in any event because of their relationship to the overall pattern of conduct charged in the balance of the indictment. Vebeliunas reiterates this claim on appeal, contending that a good deal of the lawyers' arguments and evidence at trial was directed to the RICO counts, and that

and evidence at trial was directed to the RICO counts, and that the racketeering allegations were "compelling[ly] prejudic[ial]," resulting in "retroactive misjoinder."

We addressed this issue in *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994), where we said:

> "Retroactive misjoinder" arises where joinder of multiple counts was proper initially, but later developments - such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions - render the initial joinder improper. *See generally,* 8 James Wm. Moore, *Moore's Federal Practice*, m 8.06[3] (2d ed. 1993). In this Circuit, "[t]o invoke retroactive misjoinder," a defendant "must show compelling prejudice." *United States v. Novod*, 927 F.2d 726, 728 (2d Cir.) (citations and internal quotation marks omitted), *cert. denied*, 500 U.S. 919, 111 S . Ct. 2018, 114 L.Ed.2d 104 (1991); *see United States v. Warner,* 690 F.2d 545, 553-54 (6th Cir. 1982). Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice. *See Novod*, 927 F.2d at 728.

16 F.3d at 493.

We have subsequently specified that we consider three factors when a criminal defendant raises a prejudicial spillover argument. *See United States v. Wapnick*, 60 F.3d 948, 953-54 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Jan. 2, 1996) (No. 951003), and U.S.L.W. (U.S. Mar. 21, 1996) (No. 958335); *United States v. Rooney*, 37 F.3d 847,

855-56 (2d Cir. 1994). We first examine the evidence introduced in support of the vacated count to see if it "was of such an 'inflammatory' nature that it 'would have tended to incite or arouse the jury into convicting the defendant on the remaining counts.' " *Wapnick*, 60 F.3d at 953 (quoting *United States v. Friedman*, 854 F.2d 535, 582 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989), and *Rooney*, 37 F.3d at 855). In the present case, there was little or no evidence pertaining to the RICO count that was not also admissible with respect to the remaining counts of the indictment, and none of it was particularly inflammatory. Further, the fact that it is a RICO count that was subsequently dismissed does not alone suffice to establish prejudice. *See United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983), *overruled on another ground, National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994). We note in this regard that the district court instructed the jury that the term 'racketeering" was "only . . . used by Congress to define the offense," and should not influence their "determination of whether the guilt of the defendant has been proven."

Second, we must compare the evidence and facts pertaining to the dismissed count with that pertaining to the remaining counts and examine the degree of overlap and similarity between the two. *See Wapnick*, 60 F.3d at 954; *Rooney*, 37 F.3d at 855. "In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover." Wapnick, 60 F.3d at 954 (collecting cases). As noted above, virtually all of the evidence pertaining to the RICO count was also admissible with respect to the remaining charges.

Finally, we must "make a general assessment of the strength of the government's case on the remaining counts." *Id.; see also Rooney*, 37 F.3d at 856. Here, the testimonial and

documentary evidence against Vebeliunas as to the remaining counts was very substantial. Thus, all three of the relevant factors weigh against Vebeliunas' prejudicial spillover argument. We conclude that his position lacks merit.

D. Remaining Claims.

We have carefully considered Vebeliunas' remaining claims, which are set forth at the outset of this opinion, and conclude that they are unavailing. As to the recusal claim, we affirm substantially for the reasons stated in Judge Glasser's thorough opinion.

Conclusion

We affirm the judgment of conviction and the denial of Vebeliunas' post trial recusal motion.

APPENDIX B
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

VYTAUTAS VEBELIUNAS,

Defendant.

CR-92-1388 (CBA)
MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The defendant filed a motion seeking an order which would vacate a judgment of conviction and sentence which will be more fully described hereafter. His motion is brought, principally, pursuant to 28 U.S.C. § 455 but in a footnote to his motion he states that "because § 455 and 28 U.S.C. § 144 are construed in *pari materia,* he also relies on § 144. The defendant also moved, pursuant to Rule 38, Fed. R. Crim. P., and Rule 8(a), Fed. R. App. P., for an order staying the financial terms of the judgment of conviction.

Background

The defendant was indicted on December 16, 1994 and arraigned before Judge Carol B. Amon on December 18, 1992

charged with forty-four counts which included racketeering, bank fraud, conflict of interest, misapplication of credit union funds and witness tampering. Following pretrial motions and extensive discovery, a jury trial commenced on September 27, 1993 before Judge Amon. The trial extended over a period of five weeks and the jury returned a verdict of guilty on forty-one of the forty four counts, acquitting on one count of bank fraud and two counts of witness tampering. On March 22, 1994, the court dismissed Count One of the indictment, the RICO count, and sentenced the defendant to imprisonment for a term of thirty-six months, to be followed by three years of supervised release and imposed a $60,000 fine and directed him to make restitution in the sum of $581,194. An assessment of $50 on each count was also directed to be paid.

The events which led to the defendant's conviction, briefly stated, arose out of the abuse of his position as president of the KASA Credit Union which primarily served members of the Lithuanian Community. It was alleged that the defendant caused the preparation of fraudulent loan documents to induce the Credit Union to loan millions of dollars to persons who were not the real borrowers and who were assured that they would not be responsible for repayment. The monies thus "loaned" were in fact used by entities controlled by the defendant for the acquisition of real estate. One property acquired by the defendant with Credit Union funds was a condominium apartment building known as the Beach Club of Marco Island and another was the Club Regency of Marco Island, Florida. The Credit Union ultimately came under the supervision and control of the National Credit Union Administration ("NCUA") as liquidator.

The motion to vacate the judgment of conviction is predicated upon the following assertions: In a related civil case, one James E. Ewell, in an affidavit dated May 11, 1994,

said that he is a real estate investor and in May, 1993, he was asked by a mutual friend of his and of Vebeliunas if he (Ewell) was interested in acquiring the Beach Club of Marco Island. He subsequently met Vebeliunas and expressed an interest in the property. Correspondence between them ensued anticipating a transaction in which the first mortgage, then held by the NCUA as liquidator, would be secured and the property ultimately obtained. To ascertain whether he could get the money for a possible acquisition of the first mortgage, Ewell contacted one Lewis, another real estate investor, who, in turn, contacted a local of the Carpenter's Union in Troy, New York with a view to their financing the proposed transaction.

Lewis then contacted Thomas G. Amon, Esq., the husband of Judge Amon, gave him the correspondence between Vebeliunas and Ewell which described the Beach Club of Marco Island and described its operating income and expenses in an attachment thereto. Sometime in the latter part of July, Ewell and Lewis met in Mr. Amon's office. Ewell states the purpose of the meeting was to ascertain whether Mr. Amon, "as attorney for our venture" (par. 4 Ewell Aff.) could assist them in acquiring the first mortgage. Mr. Amon then telephoned an attorney he believed was representing the NCUA to inquire about the acquisition of that mortgage. Ewell then states that Mr. Amon was advised to put the proposal in writing as there were many inquiries received about that property. Mr. Ewell further states, in paragraph 6 of his affidavit, "[a]part from the July, 1993 meeting, I have no eyewitness information about what further contact Mr. Amon had in our venture."

The affidavit of Ewell that he knows of no further involvement in the matter by Mr. Amon after that July, 1993 meeting notwithstanding, counsel for the defendant, neither

averring the truth of his statements or that they are even made upon information and belief, asserts the following:

> 24. According to the defendant . . . *after consultation with Mr. Amon*, Ewell's group was no longer willing to permit the defendant to participate in the transaction, and the Ewell group planned to make the purchase, foreclose on the second mortgage, and apparently take its chances with the defendant's legal defenses. *As a result, after consultation with Mr. Amon*, the legal and financial interests of the Ewell group and the defendant were adverse. (Emphasis mine).

The ensuing paragraphs of this notice of motion contain assertions which are undocumented or substantiated by any sworn statement or otherwise, but worded to sound an ominous ring which would serve as a call to right a miscarriage of justice and cast suspicion upon the observance by a federal judge of her oath to "administer justice without respect to persons, and . . . faithfully and impartially discharge and perform all the duties incumbent upon" her. See 28 U.S.C. § 453. I refer to such assertions as: "Neither I nor the defendant knew that Mr. Ewell had been Thomas Amon's client, nor did we know that Thomas Amon had played a role in the negotiations or the Beach Club of Marco. . . . In short, we did not know that Mr. Amon was both a participant in, and a witness to the matters we were placing before the Court" (at sentencing), (par. 25); "[w]e did not know that Thomas Amon had discussed with Mr. Groendyke (counsel to NCUA) the very matters which were the subject of dispute at the sentence hearing" (par. 25) (sic); "[i]n sum, the available evidence *shows* that while this indictment was pending, while various pretrial motions were under consideration, and shortly before defendant's trial commenced, the Judge's husband was

representing investors who were seeking to purchase the Beach Club of Marco Island and then to foreclose on the second mortgage held by defendant's company, Panagra Properties, Inc. The record also shows that these efforts to purchase Beach Club of Marco Island were a central and disputed issue at the time of sentencing." (par. 26) (emphasis mine).

Based upon those assertions, the conclusion urged upon the court is that Mr. Amon's "involvement strongly indicates that the impartiality of the judge can reasonably be questioned under 28 U.S.C. § 455. the judgment of conviction should be vacated and the matter transferred to another District Court Judge." (par. 27).

On September 8, 1994, a conference was held with Judge Amon regarding this motion which was filed in June, 1994. After reviewing the background for it, Judge Amon stated that she was never aware of any discussions her husband had with Ewell or Lewis concerning the Beach Club of Marco Island and that she first learned of it when recusal motions were filed in related civil cases. She also stated that the words "Beach Club of Marco Island" were never uttered to her husband nor was the name of the defendant ever mentioned to her husband prior to the commencement of the trial in September, 1993. (Tr. Sept. 8, 1994, p. 7). Judge Amon also stated that the evaluation of the Beach Club of Marco Island was not considered in determining the amount of restitution the defendant might be ordered to make because the parties agreed that the property was adequately collateralized and the United States did not urge its inclusion in the loss calculation. (Tr . 8-9). Because the defendant wished to elicit Mr. Amon's view of the events he described, Judge Amon thought it inappropriate for her to evaluate that aspect of the record and

requested that this motion be reassigned to another judge for determination. The motion was then reassigned to me.

At a conference later held before this court to ascertain how the parties wished to proceed, it was agreed that an affidavit from Mr. Amon would be submitted by the government and it was.

In his affidavit, Mr. Amon acknowledges being contacted by phone by James Lewis in July, 1993 regarding a Florida property. Mr. Lewis inquired if Mr. Amon had any clients interested in investing. He later met with Lewis and Ewell in his office for approximately twenty minutes. He met Ewell for the first time on that occasion. On that occasion or thereafter, he called Thomas Groendyke, Esq. who he understood represented a federal agency holding a first mortgage on the property which he learned was in Marco Island, Florida. Mr. Amon has no recollection of discussing this matter with either Ewell or Groendyke after that July meeting.

Mr. Amon also states under oath that (1) neither he nor his firm were retained by Ewell or Lewis nor did her or his firm receive, request or expect a fee in connection with the matter; (2) he did not participate in or know of any offer that may have been made to purchase the property; (3) he had no discussion about the defendant with either Lewis or Ewell; (4) he was never aware, prior to this motion, of any matter before Judge Amon which in any way related to the Beach Club of Marco Island or the defendant nor had he ever discussed with her the events in question prior to these recusal motions.

Following the submission of Mr. Amon's affidavit, the defendant submitted what is styled a "Supplemental Certified Statement With Respect to the Motion to Vacate the Judgment" signed by Mr. Ewell. Curiously, it is not a sworn statement acknowledged as such before a person authorized

to administer oaths. He adds nothing that is relevant to the issue of recusal and nothing to controvert the affidavit of Mr. Amon. The defendant's request for a hearing accompanying Mr. Ewell's submission is not supported by any meaningful reason to convene one and is hereby denied. The motion to vacate the judgment is also denied.

Discussion

An interesting question might be raised initially as to whether a motion to vacate a judgment of conviction can be bottomed upon 28 U.S.C. § 455 or whether it is one that should be brought pursuant to 28 U.S.C. § 2255 which provides the procedural mechanism for vacating sentences imposed in violation of the laws or Constitution of the United States. It is doubtful whether an appearance of impropriety under § 455(a) standing alone, would be the kind of fundamental defect that would justify vacating a sentence lawfully imposed pursuant to § 2255. *See, e.g., Hardy v. United States*, 878 F.2d 94 (2d Cir. 1989). The matter has not been raised by the parties and will not be further addressed by the court beyond the mention of it. The reliance by the defendant upon 28 U.S.C. § 144 can be summarily disposed of. That requires a party to the proceeding to file an affidavit that the judge before whom the matter is pending is personally biased or prejudiced and which shall state the facts and reasons for his belief. The defendant has not filed such an affidavit which is a pre-requisite to a motion pursuant to § 144 and to the extent that this motion is brought pursuant to that section, it is denied. 28 U.S.C. § 455 is less restrictive. An affidavit is not required. Claimed to be implicated for purposes of his motion are §§ 455(a) and (c). They provide as follows:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding

> in which his impartiality might reasonably be questioned.
>
> (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Section 455(d)(4) defines "financial interest" as meaning "ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party. . . ."

There isn't the scintilla of a suggestion that either Judge Amon or her husband had any "financial interest," as that phrase is defined, in the affairs of the defendant. Mr. Amon's affidavit, which is not controverted, unequivocally states that he was not retained by Ewell or Lewis and never received, requested, or expected a fee. It is certainly not contended or even hinted at by the defendant that he ever met or spoke with Mr. Amon — or that Mr. Amon was an "adviser or active participant" in the defendant's affairs.

Turning to § 455(a), analysis of the application of that section begins with identifying "the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberq v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). Those facts have been set out extensively above and need not be repeated. Those facts having been identified, the next step is to apply to those facts the statute and the judicial gloss that has been put on it.

A significant case with which to begin this second step is *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). Drexel, along with

others, was charged with acting in concert with Ivan Boesky and his affiliated companies, with violating the securities laws and the civil RICO statute. While that litigation was pending before Judge Pollack in the Southern District of New York, Palais Royal, Inc., a closely held corporation operating a retail chain in Texas, entered into negotiations to sell its business in a leveraged buyout transaction. Mrs. Moselle Pollack, Judge Pollack's wife, was a controlling stockholder in Palais Royal in which members of her family also held shares. The subsequently drawn contract of sale was contingent upon the purchaser obtaining the necessary financing for the buyout. Drexel was retained by the purchaser to arrange financing for the cash purchase of the corporation from the proceeds of which Mrs. Pollack for herself and as trustee would receive thirty million dollars in cash. It was based on these facts that a motion to recuse Judge Pollack was filed pursuant to 28 U.S.C. § 455(a). The teaching of Drexel has peculiar significance for the determination of this motion. The court wrote, at page 1309:

> In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person, knowing and understanding all the facts and circumstances, would believe. It is for that reason that we cannot adopt a per se rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smoke screen.... Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality.

The only relevant facts and circumstances which could reasonably bring Judge Amon's impartiality into question are that her husband had one telephone conversation with a Mr. Lewis who inquired whether Mr. Amon had clients interested in a real estate investment; a brief conference thereafter with Mr. Lewis and a James Ewell, to whom he was introduced by Lewis; and another telephone call by Mr. Amon to a Mr. Groendyke, who represented the NCUA, which was holding a first mortgage on the Beach Club of Marco Island. It is uncontroverted that Mr. Amon was not retained by Lewis or Ewell and did not receive, request or expect a fee from either Lewis or Ewell. In an affidavit, Ewell confirms that he had only one meeting with Mr. Amon in July, 1993 and had no contact with him at all thereafter. Without more, these facts cannot reasonably bring into question the impartiality of Judge Amon. When added to those facts is the sworn statement of Mr. Amon that he never met or spoke with Vebeliunas, had no knowledge of any matter over which Judge Amon was presiding which concerned the Beach Club of Marco Island, and the statement of Judge Amon that she never mentioned either Vebeliunas or Marco Island to her husband prior to the filing of recusal motions, this court readily concludes that no reasonable person, knowing all those facts, could question the impartiality of the judge. It is difficult, if not impossible, to understand what interest either Judge Amon or her husband could have had in the outcome of this criminal prosecution which could conceivably have affected her impartiality. Judge Cardamone's observation that that which is seen as smoke is merely a smoke screen is peculiarly apt here. Judge Mukasey in *United States v. El-Gabrowney*, 844 F. Supp. 955 (S.D.N.Y. 1994), captured the same thought with these felicitous words at pages 961-2:

> . . . [T]o say that § 455(a) requires concern for appearances is not to say that it requires concern for mirages. . . . "Section 455(a) was not meant to require disqualification every time one party can make some argument, no matter how unreasonable, that the appearance of prejudice would result." (Citation omitted).
>
> * * *
>
> That someone with an imagination or a motive might hallucinate relevance is not the standard. .

"The problem, . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljeberq*, 486 U.S. at 864-5. The dimension of the "problem" is best reflected, perhaps, by the reference to 647 cases which a Shepard's citation search of only subdivision (a) of § 455, revealed. That staggering number gives rise to one of two inferences. Either the federal judiciary is shamefully insensitive to circumstances from which their impartiality might reasonably be questioned, or the Bar is afflicted with a chronic case of myopia and sees mirages. Cursory research would suggest the latter inference is far more correctly drawn.

A review of some of the pertinent precedents bearing a relationship to this case may be useful. In *Matter of Billedeaux*, 972 F.2d 104 (5th Cir. 1992), the plaintiff sought to disqualify the presiding district court judge on the ground that the judge's husband is a partner in a law firm which actively represented the defendant in the lawsuit in many other cases. There was no assertion that the judge ever represented the defendant or that her husband ever handled matters for that client. The petition to disqualify is based solely upon the plaintiff's

surmise that the economic interest her husband's firm has in the client raises the spectre of partiality at which § 455 is aimed. In affirming the denial of the petition the court held that speculation that is at best "remote and unrealistic . . . does not justify disqualification." 972 F.2d at 106. There was "no reason to conclude or speculate" said the court, that any action the judge might take in the case would affect her husband or her husband's firm. And quoting from *Drexel Burnham* that "[A] 'remote, contingent, or speculative' interest is not one 'which reasonably brings into question a judge's partiality,'" concluded by holding that "[i]f a reasonable person knew all the relevant facts, he or she would know that any interest that could be attributed to Judge [Amon] in the fate of her husband's law firm's sometime client is so remote and speculative as to dispel any perception of impropriety." 972 F.2d at 106.

In *Hewlett-Packard Co. v. Bausch & Lomb. Inc.*, 882 F.2d 1556 (Fed. Cir. 1989), *cert. denied,* 493 U.S. 1076 (1990, after the entry of a judgment, the defendant moved to disqualify the trial judge pursuant to § 455(a) on the ground that the employment of the judge's son by Hewlett-Packard would cause a reasonable person to question the judge's impartiality. In affirming the denial of the motion to recuse, the court made reference to a number of cases which are of more than passing interest. For example, in *In re Fox West Coast Theatres*, 88 F.2d 212, 226 (9th Cir.), *cert. denied*, 301 U.S. 710 (1937) (even if judge's son were employed by bankrupt, that fact would not disqualify judge from hearing bankruptcy proceeding); *United States v. Equifax*, 557 F.2d 456, 463-64 (5th Cir. 1977), *cert. denied*, 443 U.S. 1035 (1978) (§ 455(a) did not require recusal when judge's son was associate of law firm representing defendant); *Voltmann v. United Fruit Co.*, 147 F.2d 514, 517 (2d Cir. 1945) (no disqualification through

judge's son-in-law a member of the firm representing the defendant). The court made special mention of the fact that the judge had ruled in favor of the defendant prior to the present lawsuit. It should be noted that here, too, Judge Amon dismissed the RICO account against the defendant.

In *Strey v. Hunt International Resources Corporation*, 516 F. Supp. 22 (D.C. Colo. 1981), the defendant moved to recuse the trial judge because the defendant was a client of her husband's law firm. In denying the motion, the court observed, at page 24: "Defendants' position, if accepted, would require that I disqualify myself whenever a party in an action before me brings an unrelated case in another court against a client of my husband's firm, without regard to the stage of the proceedings in the suit before me, the relative interests of the common party in the two lawsuits, the actual involvement of my spouse in the other proceeding, or the possible prejudice of the other parties in the case before me. Due to the obvious potential for abuse, I cannot accept the principle which defendants advance." *See also Union Carbide Corporation v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986) (it is one thing to assume that judges are human beings with the usual human emotions and another to attribute to them a malevolent, a calculating, vindictiveness).

In *United States v. Lovaglia*, 954 F.2d 811 (2d Cir. 1992) after pleading guilty and prior to being sentenced, a defendant requested the judge to recuse himself based upon the assertion that the judge's former law firm represented one of the victims of the defendant's crimes and that the judge had an interest in a restaurant with one of the shareholders of the victim corporation. The request was denied. In affirming that denial, and after reciting the test the application of § 455(a) requires to be met, the court acknowledged *Drexel* to the effect that "where a case, . . . involves remote, contingent, indirect or

speculative interests, disqualification is not required," nor does the judge's prior representation of one of the parties to the proceeding require disqualification. 954 F.2d at 815. The court also noted that where the trial judge in that case, as is true of the trial judge here, had no specific knowledge of the contested facts and the allegations were not outcome determinative in the proceedings before the court, recusal was not warranted. *See also In re National Union Fire Insurance Co. Of Pittsburgh, Pennsylvania*, 839 F.2d 1226, 1230 (7th Cir. 1988) (A judge's relatives may engage in commercial transaction of one kind or another with large numbers of persons embroiled in litigation. The risk to the impartiality of the judge is too small, and the risk of manipulation by litigants too large, to treat parent and child as one. A judge who cannot be expected to remain impartial through trivial matters such as this should not be sitting even when his family is unaffected); *United States v. Kehlbeck*, 766 F. Supp. 707 (S.D. Ind. 1990).

Sight must not be lost of the significant fact that this prosecution was tried to a jury which determined all factual matters. Evidentiary rulings and rulings on other legal issues which the defendant may claim to be erroneous, may be reviewed on appeal. *See, e.g. United States v. El-Gabrowney*, 844 F. Supp. 955, 962 (S.D.N.Y. 1994); *Simonson v. General Motors Corp.*, 425 F. Supp. 574 (E.D. Pa. 1976).

The defendant places great reliance upon *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and upon *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988). Those cases bear little resemblance to this one and are readily distinguishable. In *Liljeberg* the trial judge was a member of the Board of Trustees of Loyola University which was engaged in lengthy negotiations for the sale of property with a party to a law suit before him. The Court was critical of his

failure to recuse himself. They held that "it is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees... completely forgot about the University's interest in having a hospital constructed on its property. . . ." That "it is remarkable — and quite inexcusable — that Judge Collins failed to recuse himself" after receiving three letters in which the details of the transactions were discussed." 486 U.S. at 865-6. Judge Amon, unlike Judge Collins, was not a fiduciary and had no knowledge of her husband's brief encounter with Lewis and Ewell.

In *Faulkner*, a relative with a close relationship to the judge was an important participant in key transactions which formed the basis of an indictment. It was of more significance that the relative communicated to the judge material facts of the case and her opinions and attitudes regarding those facts. On those findings, the doctrine *of res ipsa loquitur* springs to mind.

For all of the foregoing reasons, the motion to vacate the judgment based upon 28 U.S.C. § 455 is denied.

The defendant's motion for a stay of the financial terms of the judgment is respectfully referred back to Judge Amon.

SO ORDERED.

Dated: Brooklyn, New York
December 1994

/signature
United States District Judge

Copies of the foregoing Memorandum and Order were this day sent to:

Robert M. Stolz, Esq.
Assistant U.S. Attorney

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APPENDIX C
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING THE PETITION FOR REHEARING AND THE SUGGESTION FOR REHEARING IN BANC

United States Court of Appeals

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE

40 FOLEY SQUARE
NEW YORK 1007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of new York, on the 20th day of June, one thousand nine hundred and ninety-six.

USA

Appellee,

v

Vebeliunas

Defendant-Appellant.

Dkt. No: 94-1185

STAMP/United States Court of Appeals
Second Circuit
Filed Jun 20 1996
George Lange III, Clerk

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Vytautas Vebeliunas.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By:

/signature
Arthur Heller
Administrative Attorney

APPENDIX D
28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.